In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 126

JEROME S. MURRAY AND GRACE H. MURRAY,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The principal issue in this case is whether petitioner [1] held three tracts of real property "primarily" for investment purposes, thus qualifying them for treatment as capital assets, or whether he held them "primarily" for sale to customers in the ordinary course of his trade or business, with the result under

[1] "Petitioner" refers to Jerome S. Murray. His wife is a party solely because joint returns were filed for the years in question.

Section 1221(1) of 1954 Code that any profit on their sale should be treated as ordinary income. The Tax Court first determined that petitioner's business included dealing in real estate, although he also was an investor with respect to some properties (R. 23, 50.)[2] That court then found petitioner had held the three properties here involved primarily for sale to customers in the ordinary course of his business, and that the profits received during the years 1957 through 1961[3] in installment payments should be taxed as ordinary income. (R. 54, 56, 79.) The Fourth Circuit affirmed, finding the Tax Court's decision consistent with this Court's intervening opinion in *Malat* v. *Riddell*, 383 U.S. 569 (Pet. 1a-2a).

Each of the lower courts applied correct standards of law to findings of fact having ample support in the evidence, and there is no conflict with any other court of appeals decision rendered since *Malat*. Accordingly, no occasion for further review is presented.

1. Whether petitioner was a dealer in real estate is a fact to be determined from examination of all available facts concerning petitioner's business activi-

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[2] "R." references are to the Appendix to the taxpayer's brief in the court of appeals. "Supp. R." references are to Appendix B to the Commissioner's brief in the court of appeals.

[3] Petitioner has not sought appellate review with respect to 1957. Although the Tax Court found that three properties sold in that year had been held in petitioner's capacity as a dealer (R. 68-70), reversal would not have affected petitioner's tax liability for that year, as he had an overall loss that by reason of Section 172(d)(2)(B) of the Code could not be applied to reduce income in other years.

ties. *Gault* v. *Commissioner*, 332 F. 2d 94 (C.A. 2). That his usual and predominant source of income consisted of profits from the sale of real estate (R. 49-50) may in itself be sufficient to support the Tax Court's finding.[4] See *Frankenstein* v. *Commissioner*, 272 F. 2d 135 (C.A. 7). The Tax Court in addition found support for its conclusion in the number, continuing nature, and substantiality of petitioner's real estate transactions, and in the fact that petitioner at times found it necessary to transact his business through a straw man, because knowledge of his interest would cause increased market prices (R. 22, 49-50; Supp. R. 34-35). In these circumstances, the Tax Court's conclusion is in accord with those reached by various courts of appeals in comparable situations. *E.g.*, *Gault* v. *Commissioner*, *supra*; *Frankenstein* v. *Commissioner*, *supra*; *Mauldin* v. *Commissioner*, 195 F. 2d 714 (C.A. 10).

Petitioner does not dispute the underlying facts taken into consideration below, but disagrees with the relative importance attached to them (see Pet. 10-11). Whether he acted as a broker—*i.e.*, on behalf of others—is not pertinent; the question is whether he bought and sold on his own behalf. That he did not advertise is hardly conclusive where petitioner has ready access to the market so that advertising is not needed to bring customers in. *Gault* v. *Commissioner*, *supra*; *Mauldin* v. *Commissioner*, *supra*. Nor was

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[4] In no event could the sizeable amount of those profits show, as petitioner seems to assert (Pet. 11), that he was not a dealer.

there error in the Tax Court's reliance on the absence of rental or other investment income on certain properties; petitioner did not claim an intent to hold property for long term appreciation, and the Tax Court refused to credit his testimony about his unrealized but intended means of securing investment income.[5] (See R. 52-53.)

2. The Tax Court recognized that the purpose of holding a specific parcel of real estate is to be determined from examination of a variety of circumstances, and that each case "turns upon its own peculiar facts" (R. 48). Accord: *Scheuber* v. *Commissioner*, 371 F. 2d 996, 998 (C.A. 7); *Mauldin* v. *Commissioner*, *supra*. It thus reviewed all the circumstances attendant upon a number of petitioner's transactions. Although its opinion was written prior to this Court's decision in *Malat*, the Tax Court tested its conclusion with respect to each transaction by the interpretation of the word "primarily" in Section 1221(1) of the Code—a meaning of "first importance" or "principally"—developed by the Eighth Circuit in *Municipal Bond Corp.* v. *Commissioner*, 341 F. 2d 683, and approved by this Court in *Malat*, 383 U.S. at 572 (R. 50, n. 6).

The holding of some of the parcels at issue below was found to have been for investment and not primarily for sale to customers in the ordinary course

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[5] Neither *Malat* v. *Riddell*, nor *Scheuber* v. *Commissioner*, 371 F. 2d 996 (C.A. 7), is pertinent in determining the nature of petitioner's business, since in each case the taxpayer conceded that he was a real estate dealer at least with respect to some properties.

of business.[6] The Tax Court found, on the other hand, that three parcels, the Gordon Tract, the Berry Option, and the Adams or "Potomac" property, had been held primarily for sale in the regular course of business, and therefore did not qualify for treatment as capital assets (R. 54, 56, 70). In this Court, petitioner expressly attacks only the finding made with respect to the Gordon Tract (Pet. 7).

In December 1952 petitioner contracted to purchase for $1,000,000 approximately 500 acres owned by the Estate of Fulton R. Gordon. Because of delays in securing a survey and clearing title, the purchase had not been closed by the middle of 1954. At that time, petitioner was approached by a broker representing a prospective purchaser of the property. After ensuing negotiations, petitioner in March 1955 assigned his rights to the property in a transaction[7] that resulted in the deficiency challenged below. (R. 23-26.)

No evidence was introduced to demonstrate, and no claim has been made, even in this Court, that petitioner intended to hold the property for long term appreciation. The Tax Court refused to credit petitioner's "self-serving testimony" that he intended to use the land for the purpose of mining it for sand and gravel, selling the timber on it, and ultimately obtaining ground rents. The court noted that ground

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[6] Respondent did not seek review of the determinations favorable to petitioner.

[7] The transfer included other rights that petitioner secured in the process of clearing title, and contiguous tracts acquired during 1953 and 1954. (R. 25-26.)

rents are in any event frequently created in Maryland for the purpose of capitalizing profits upon the subdivision and resale of lots in a real estate development (R. 52-53). See, *e.g.*, *Welsh Homes, Inc.* v. *Commissioner*, 279 F. 2d 391, 394 (C.A. 4). Because of the timing and circumstances of the sale, and in view of the lack of any attempt to secure investment income from the property, the court concluded that the rights to the Gordon property had been held primarily for sale in the ordinary course of business (R. 53-54).[*]

Petitioner's reliance on an asserted conflict with *Scheuber* v. *Commissioner*, *supra*, is misplaced. In *Scheuber*, the Seventh Circuit overturned as clearly erroneous a Tax Court finding that the taxpayer had held two tracts of real estate primarily for sale in the ordinary course of business. On that record, an important consideration, on which petitioner places particular reliance here (Pet. 7), was the amount of profit. 371 F. 2d at 999. One of Scheuber's parcels had appreciated from $12,000 to $32,000; the other from $10,000 to $30,000 for one half and $100,000 for the other half. The holding periods of 5 to 14 years were apparently inconsistent with Scheuber's practice of selling within "a short time" prop-

[*] Petitioner made no claim that he had held for appreciation either the Berry Option, which was owned for 9 months, or the Potomac property, which was sold after 3 years. The Tax Court found "unconvincing" petitioner's claim that an investment use of the Berry property existed in his asserted intention to create ground rents (R. 38, 55-56). The Tax Court could find no evidence indicating an investment purpose for holding the Potomac property (R. 70).

erties held as a dealer. See *id.* at 997. In the present case the facts are materially different. The Gordon contract was sold at a profit of $1,890,000 on the basis of a purchase price in excess of $1,000,000, little more than 2 years after the first, and less than a year after the last, rights to the property were acquired (R. 13, 25).

3. There is no merit to petitioner's position that the Commissioner was foreclosed from asserting deficiencies with respect to installment payments received in later years (R. 27, 38) because petitioner's treatment of the transactions as capital was not disputed in audits of petitioner's returns for 1955 and 1956, the years, respectively, of the Gordon and Berry sales. Audit without taking exception to a taxpayer's treatment of income from a transaction in one year does not estop the Commissioner from challenging the tax treatment of income from the same or a similar transaction in other years, see, *e.g.*, *Niles Bement Pond Co.* v. *United States*, 281 U.S. 357, 361-362; *Municipal Bond Corp.* v. *Commissioner*, 341 F. 2d 683, 691 (C.A. 8) (installment payments upon the sale of real estate); *Mt. Vernon Trust Co.* v. *Commissioner*, 75 F. 2d 938, 940 (C.A. 2), or shift to the Commissioner the burden of proof with respect to the other years, see *Walker* v. *Commissioner*, 362 F. 2d 140, 142-143 (C.A. 7); *Easter* v. *Commissioner*, 338 F. 2d 968, 969-970 (C.A. 4), certiorari denied, 381 U.S. 912.

There is nothing to the contrary in *Arrowsmith* v. *Commissioner*, 344 U.S. 6. In that case, the taxpay-

ers had received liquidation distributions from a corporation in 1937 through 1940, which were concededly capital income. But in 1944 they were required, as transferees of the corporate assets, to pay a judgment against the corporation. This Court held that it was proper, in determining whether the 1944 repayment was a capital or ordinary loss, to take into consideration all of the pertinent events beginning in 1937, and that such an approach was not an attempt to reopen the tax returns for the earlier years.

In the present case the Commissioner did precisely what this Court approved in *Arrowsmith*. He did not attempt to reopen the returns for 1955 and 1956, for which the limitations period had run, but examined the events of those earlier years in determining the character of resulting payments received in the later years.

4. Nor was there error in the Tax Court's consideration of the activities and tax returns of petitioner's wholly owned corporation, Stewart's Corner. The disclosure of the corporate tax returns was lawful since it occurred in a judicial proceeding. *Blair* v. *Oesterlein Co.*, 275 U.S. 220, 227. Moreover, petitioner had used the corporation as his agent and "straw" (R. 22, 35, 40), so that its activities were properly given probative force in determining the nature of petitioner's business. See *Municipal Bond Corp.* v. *Commissioner*, *supra*, at 691; *Kaltreider* v. *Commissioner*, 255 F. 2d 833, 838 (C.A. 3); *Bauschard* v. *Commissioner*, 279 F. 2d 115, 116 (C.A. 6).

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

DAVID O. WALTER,
LAWRENCE B. SILVER,
Attorneys.

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